

Restorative Justice
for Hawai‘i’s¹ First People:
Selected Amicus Curiae Briefs in
Doe v. Kamehameha Schools

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*We’re not asking for a handout;
we’re asking to be able to take care of our own.*²

—Miki Kim, a 1976 Kamehameha Schools graduate

1. English and Hawaiian are the official languages of Hawai‘i. HAW. CONST. art. XV, § 4; HAW. REV. STAT. § 5-6.5 (2006). In the Hawaiian language, an ‘okina or glottal stop is considered a consonant; this consonant is part of the word Hawai‘i, meaning both the island of the Hawai‘i and the group of islands. MARY KAWENA PUKUI & SAMUEL H. ELBERT, HAWAIIAN DICTIONARY xvii, 62 (rev. & enlarged ed. 1986). In this article, the authors have chosen to be consistent with Hawaiian language practice by including the glottal stop in the word Hawai‘i.

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2. Mark Niese, Associated Press, *School’s Admission Policy Back in Court*, HONOLULU STAR-BULL., June 19, 2006, available at <http://starbulletin.com/2006/06/19/news/story03.html> (quoting Miki Kim, a 1976 Kamehameha Schools graduate).

In 2003, an anonymous plaintiff ("John Doe") filed suit in federal court against Kamehameha Schools, claiming that its 117-year-old admissions policy favoring indigenous Hawaiian children "discriminates" against non-Hawaiians in violation of federal civil rights law.³ John Doe's attorneys called the policy "categorical racial exclusion" and "segregation."⁴ They conjured up infamous images of George Wallace "standing in the schoolhouse door to prevent the admission of qualified children simply because they have the wrong skin color and bloodline."⁵ Native Hawaiians, on the other hand, decried the distortion of "civil rights" to deny indigenous Hawaiians' claims to self-education and governance. For them, Kamehameha Schools offered no special privileges or "racial preferences," but instead provided a form of self-determination: "We're not asking for a handout; we're asking to be able to take care of our own."⁶ For Hawaiians, the Schools afforded a measure of restorative justice "for a . . . people in their own homeland who are suffering."⁷

In December 2006, the U.S. Court of Appeals for the Ninth Circuit, sitting en banc, decided *Doe v. Kamehameha Schools*.⁸ An eight-judge majority upheld the private schools' admissions policy and rejected the contention that the Schools discriminate in violation of 42 U.S.C. § 1981, a post-Civil War civil rights statute aimed at uplifting freed Black slaves from two hundred years of systemic subordination.⁹ The majority opinion, authored by Judge Susan Graber, recognized that indigenous Hawaiians face a multitude of ills traceable to the onset of Western economic and political control of the Hawaiian Islands.¹⁰ The court also noted that Kamehameha Schools serve to counteract the severe and systemic educational disadvantages facing Native Hawaiians today.¹¹ With a firm grasp of Native Hawaiian history and context, the majority concluded that "Congress intended that a preference for Native Hawaiians, in Hawai[']i,

3. *Doe v. Kamehameha Sch.*, 295 F. Supp. 2d 1141, 1159 (D. Haw. 2003).

4. Rick Daysog & Debra Barayuga, *Federal Judge Upholds Hawaiians-Only School*, HONOLULU STAR-BULL., Nov. 18, 2003, available at <http://starbulletin.com/2003/11/18/news/story1.html> (quoting Eric Grant, attorney for John Doe).

5. Rod Antone et al., *Kamehameha Sued Over Its Admissions*, HONOLULU STAR-BULL., June 26, 2003, available at <http://starbulletin.com/2003/06/26/news/story2.html>; see also Eric K. Yamamoto & Catherine Corpus Betts, *The Backstory to Rice v. Cayetano: Disfiguring Civil Rights to Deny Indigenous Hawaiian Self-Determination*, in RACE AND LAW STORIES (Rachel Moran & Devon Carbado eds., forthcoming 2007).

6. Niese, *supra* note 2.

7. *Id.* (quoting Kekoa Paulsen, a spokesperson for Kamehameha Schools).

8. *Doe v. Kamehameha Sch.*, 470 F.3d 827 (9th Cir. 2006) (en banc).

9. *Id.* at 849; see also John Hope Franklin, *The Civil Rights Act of 1866 Revisited*, 41 HASTINGS L.J. 1135, 1135 (1990) (recognizing that the Civil Rights Act of 1866 "made significant contributions to the difficult transition of African Americans from slavery to freedom in the post-Civil War years"); Cass R. Sunstein, *The Anticaste Principle*, 92 MICH. L. REV. 2410, 2435 (1994) (noting that "[a]n important purpose of the Civil War Amendments was the attack on racial caste").

10. *Kamehameha Sch.*, 470 F.3d at 830-31.

11. *Id.* at 843-44.

by a Native Hawaiian organization, located on the Hawaiian monarchy's ancestral lands, be upheld because it furthers the urgent need for better education of Native Hawaiians, which Congress has repeatedly identified as necessary."¹²

The private trust of Princess Bernice Pauahi Bishop, the last direct descendant of Hawai'i's first king, created the Kamehameha Schools in 1883, nearly fifteen years before the United States annexed Hawai'i. The princess created the trust to uplift Hawaiian children through education because the forces of Western encroachment had nearly decimated the Hawaiian people and foreshadowed the American takeover of the Hawaiian government. The princess sought not to exclude non-Hawaiians by labeling them inferior or unworthy (a classic civil-rights violation) but rather to rebuild her own people (an act of restoration and self-determination).¹³

Princess Pauahi Bishop had witnessed the decimation of Hawai'i's indigenous population—from a conservative estimate of 400,000 at the time of first European contact in 1778 to less than 45,000 a century later.¹⁴ In the face of accelerating American military and plantation economic control of the Hawaiian islands and the continuing loss of Hawaiian life and destruction of Hawaiian culture, the Princess dedicated her royal land

12. *Id.* at 849. Moreover, the court stated, "Because the Schools are a wholly private K-12 educational establishment, whose preferential admissions policy is designed to counteract the significant, current educational deficits of Native Hawaiian children in Hawai'i, and because in 1991 Congress clearly intended § 1981 to exist in harmony with its other legislation providing specially for the education of Native Hawaiians, we must conclude that the admissions policy is valid under 42 U.S.C. § 1981." *Id.*

In its analysis, the court adopted a modified three-step *Johnson* inquiry to determine "whether a wholly private K-12 educational institution's remedial admissions policy is valid." *Id.* at 841 (referring to the test in *Johnson v. Transp. Agency*, 480 U.S. 616 (1987)). It thus held that: (1) Kamehameha Schools showed that "specific, significant imbalances in educational achievement currently affect Native Hawaiians in Hawai'i and that the Schools aim to remedy that imbalance"; (2) the Schools' admissions policy does not unnecessarily trammel the rights of non-Native Hawaiians because students denied admission to the Schools have ample alternative educational options, and as Congress expressly recognized, "in the unique context of Native Hawaiian history, affirmative measures are needed to address present, severe inequalities in educational achievement"; and (3) the Schools' policy changes "as the capacity of the Schools' programs increases and as the well-being of the Native Hawaiian community rises, the policy does no more than is necessary in light of the significant educational imbalances that Native Hawaiians continue to face." *Id.* at 844-46.

In a concurring opinion, in which four other judges joined, Judge William Fletcher suggested an alternative analysis. He concluded that "Congress has invariably treated 'Native Hawaiian' as a political classification [rather than merely a racial one] for purposes of providing exclusive educational and other benefits. Under the special relationship doctrine, Congress has the power to do so. I see nothing in § 1981 to indicate that Congress intended to impose upon private institutions a more restrictive standard for the provision of benefits to Native Hawaiians than it has imposed upon itself." *Id.* at 856-57 (Fletcher, J., concurring).

13. See Eric Yamamoto, Susan Kiyomi Serrano & Eva Paterson, Op-Ed., *Kamehameha Admissions Don't Offend Our Civil Rights*, HONOLULU ADVERTISER, Nov. 1, 2004, available at <http://the.honoluluadvertiser.com/article/2004/Nov/01/op/op05p.html>.

14. See *Doe v. Kamehameha Sch.*, 295 F. Supp. 2d 1141, 1146, 1155 (D. Haw. 2003); DAVID E. STANNARD, BEFORE THE HORROR: THE POPULATION OF HAWAII ON THE EVE OF WESTERN CONTACT (1989).

holdings to create a school to educate Hawaiian children and ensure their future physical as well as cultural and economic survival.¹⁵

Princess Pauahi Bishop's grasp of the urgency of changing circumstances proved prescient. In 1893, the United States assisted in the illegal overthrow of the sovereign Hawaiian nation. President Cleveland's emissary James Blount investigated the United States' role in the overthrow and found it to be a stark violation of international law.¹⁶ President Cleveland declared the overthrow improper, calling it an "act of war, committed with the participation of a diplomatic representative of the United States and without authority of Congress."¹⁷ In 1897, 21,000 Native Hawaiians, led by former Queen Lili'uokalani, sent Congress a petition opposing U.S. annexation of Hawai'i.¹⁸

With the end of Cleveland's presidency in 1896, American military and plantation owners lobbied hard for annexation, alternatively characterizing indigenous Hawaiians as uncivilized or childlike—in either case, in need of American control.¹⁹ With a military base at Pearl Harbor and a hot commodity (sugar) at stake, the U.S. annexed Hawai'i in 1898 and not only took control of the provisional government, but also confiscated all former Hawaiian government and royal lands—almost half of Hawai'i's fertile land mass.²⁰ Hawaiian language was barred from the schools. Plantations diverted water from agrarian Hawaiian communities. More and more Hawaiians were separated from the land—to which they

15. See *Kamehameha Sch.*, 295 F. Supp. 2d at 1155. Kamehameha Schools' admissions policy was enacted by the first Board of Trustees, headed by Princess Pauahi Bishop's widower, Charles Reed Bishop, who explained her intent in a speech during the Schools' first Founder's Day observance in 1889:

Bernice Pauahi Bishop, by founding the Kamehameha Schools, intended to establish institutions which should be of lasting benefit to her country And so, in order that her own people might have the opportunity for fitting themselves for such competition, and be able to hold their own in a manly and friendly way, without asking any favors which they were not likely to receive, these schools were provided for, in which Hawaiians have the preference, and which she hoped they would value and take the advantages of as fully as possible.

Id. (quoting Charles Reed Bishop's 1889 speech (citation omitted)).

16. See S.J. Res. 19, 103d Congress, 107 Stat. 1510 (1993).

17. *Id.*

18. See Yamamoto & Betts, *supra* note 5 (citing Noenoe Silva, *Kanaka Maoli Resistance to Annexation*, 1 'ŌIWI: A NATIVE HAWAIIAN J. 40 (1999)). In 1895, the beloved former Queen Lili'uokalani was imprisoned for misprision of treason. Her sentence was commuted in 1896.

19. See LILIKALĀ KAME'ELEIHIWA, NATIVE LAND AND FOREIGN DESIRES: PEHEA LĀ E PONO AI? 305 (1992) (account of characterization of Hawaiians as "ignorant Natives"); SALLY ENGLE MERRY, COLONIZING HAWAI'I: THE CULTURAL POWER OF LAW 139 (2000) ("paternalistic racism" characterized Native Hawaiians as "childlike, benign, and foolish"); NOENOE K. SILVA, ALOHA BETRAYED: NATIVE HAWAIIAN RESISTANCE TO AMERICAN COLONIALISM 51-54, 59-61, 72-73 (2004) (Hawaiians were characterized as "lazy," "savage," "barbaric," "degraded," "ignorant," "incompetent" and "inferior").

20. See NATIVE HAWAIIAN RIGHTS HANDBOOK 26-30 (Melody Kapilialoha MacKenzie ed., 1991).

bore a cultural, economic and spiritual connection.²¹ Beyond the Hawaiian Islands, American colonialism spread worldwide during this era, reaching new heights in 1898 with U.S. territorial acquisitions of the Philippines, Puerto Rico and Guam.²²

This form of American "westernization" hastened the near-demise of indigenous Hawaiians, resulting in a present-day native Hawaiian population that bears the worst socio-economic indicators of Hawai'i's people with the highest rates of serious illness, prison incarceration and homelessness, and the lowest rates of higher education attainment and family income.²³ Indeed, Congress's Apology Resolution of 1993 acknowledged this and commanded the President to apologize for the United States' active role in the "conspiracy" to illegally overthrow the internationally-recognized Hawaiian government and for the ensuing "devastation" of the Hawaiian people.²⁴ The Apology Resolution also recognized that the "indigenous Hawaiian people never directly relinquished their claims to their inherent sovereignty as a people or over their national lands to the United States."²⁵

In *Doe v. Kamehameha Schools*,²⁶ U.S. District Court Judge Alan Kay upheld the Schools' policy, recognizing that the policy is about justice for Hawai'i's first people—a private effort to redress the continuing economic and cultural harms to Hawaiians. Judge Kay closely examined the long-term negative consequences of accelerating "western influence" on

21. See JONATHAN KAY KAMAKAWIWO'OLE OSORIO, *DISMEMBERING LĀHUI: A HISTORY OF THE HAWAIIAN NATION TO 1887* (2002); HAUNANI-KAY TRASK, *FROM A NATIVE DAUGHTER: COLONIALISM AND SOVEREIGNTY IN HAWAII* (Univ. Haw. Press 1999) (1993); Melody Kapilialoha MacKenzie & Susan K. Serrano, *A New Kind of Environmental Justice: Indigenous Hawaiians Reclaiming Land and Resources*, in NATURAL RESOURCES & ENVIRONMENT (forthcoming 2007).

22. See STEPHEN KINZER, *OVERTHROW: AMERICA'S CENTURY OF REGIME CHANGE FROM HAWAII TO IRAQ* (2006); Ediberto Roman, *The Alien-Citizen Paradox and Other Consequences of U.S. Colonialism*, 26 FLA. ST. U. L. REV. 1 (1998); Pedro A. Malavet, *Puerto Rico: Cultural Nation, American Colony*, 6 MICH. J. RACE & L. 1 (2000); Sylvia R. Lazos Vargas, *History, Legal Scholarship, and LatCrit Theory: The Case of Racial Transformations Circa the Spanish American War, 1896-1900*, 78 DENV. U. L. REV. 921 (2001); see also Laura E. Gómez, *Off-White in an Age of White Supremacy: Mexican Elites and the Rights of Indians and Blacks in Nineteenth-Century New Mexico*, 25 CHICANO-LATINO L. REV. 9, 56-57 (2005) (highlighting the Mexican War and the subsequent annexation of more than half of Mexico's territory in the 1840s as the "first imperial moment" and precursor to the "second imperial moment," the Spanish-American War and annexation of Hawai'i in the 1890s).

23. *Doe v. Kamehameha Sch.*, 470 F.3d 827, 833-34; U.S. DEP'T OF THE INTERIOR & U.S. DEP'T OF JUSTICE, *FROM MAUKA TO MAKAI: THE RIVER OF JUSTICE MUST FLOW FREELY 2* (2000), available at <http://purl.access.gpo.gov/GPO/LPS14622>.

24. S.J. Res. 19, 103d Congress, 107 Stat. 1510 (1993).

25. *Id.* Today, the Kamehameha Schools operate three K-12 campuses. Part of the Kamehameha Schools' admissions policy is to offer admission first to students of Native Hawaiian ancestry, defined to include any person descended from the aboriginal people who exercised sovereignty in the Hawaiian Islands prior to 1778. While there are around 70,000 school-aged children in Hawai'i who meet the Schools' definition of Native Hawaiian, the Schools' total enrollment is only about 4,856 students. The admissions policy thus "operates to admit students without any Hawaiian ancestry only after all qualified applicants with such ancestry have been admitted." *Kamehameha Sch.*, 470 F.3d at 832.

26. *Doe v. Kamehameha Sch.*, 295 F.Supp. 2d 1141 (D. Haw. 2003).

Hawai'i's indigenous people and ruled that Kamehameha Schools' policy served a "legitimate remedial purpose by addressing the socioeconomic and educational disadvantages facing Native Hawaiians."²⁷ He thus recognized that the Schools' policy was a legitimate effort to restore to Native Hawaiians that which American colonialism in the late nineteenth century nearly destroyed: Hawaiian education, culture and a measure of self-governance.

On appeal, a three-judge panel of the Ninth Circuit Court of Appeals ruled that Kamehameha Schools' admissions policy unlawfully discriminated against Doe in violation of 42 U.S.C. § 1981.²⁸ The panel decision authored by Judge Jay Bybee, a 2003 appointee of President George W. Bush to the Ninth Circuit, stunned Hawai'i's multiracial populace. Protestors held rallies against the decision in Hawai'i, California, Washington, Oregon and on the East Coast. Many Hawaiians in their homeland felt that they, as well as their right of self-determination, were under attack.

Kamehameha Schools petitioned for an en banc review, supported by eleven amicus curiae briefs filed by a diverse array of local and national organizations and individuals.²⁹ Four of these briefs are reproduced in part below. Although each brief takes a different approach, all four offer compelling arguments to show that Kamehameha Schools' program is not about violating civil rights by treating one group as superior. Rather, Kamehameha Schools are part of private and public efforts aimed at restorative justice, to repair the harm to Hawai'i's first people for the benefit of all.

In the first brief, the 'Ilio'ulaokalani Coalition sets forth a persuasive historical argument in support of Kamehameha Schools' admissions policy. It describes the special responsibility under Hawaiian custom and tradition of the ali'i, or chiefs, to care for others, and argues that Kamehameha Schools serve to fulfill those same responsibilities to the Hawaiian people. Looking also to the history of the Civil Rights Act of 1866, the brief asserts that § 1981 does not apply because Kamehameha Schools' policy was created, as an act of self-determination, while Hawai'i was a sovereign nation and outside the ambit of the United States Constitution. The private, charitable educational institution receives no federal funding and was created with the private lands of a pre-existing sovereign to address the

27. *Id.* at 1172. Judge Kay declared that it "would be ironic indeed if a [civil rights] law triggered by a Nation's concern over centuries of racial injustice [(slavery)] and intended to improve the lot of those who had 'been excluded from the American dream for so long' [(African Americans)], constituted the first legislative prohibition of [a] voluntary, private" school for native children created in light of "their unique status as indigenous people of a once sovereign nation as to whom the United States has established a trust relationship." *Id.* at 1152, 1164-65 (citation omitted).

28. *Doe v. Kamehameha Sch.*, 416 F.3d 1025 (9th Cir. 2005).

29. The Ninth Circuit agreed to a rehearing en banc in February 2006. *See Doe v. Kamehameha Sch.*, 441 F.3d 1029 (9th Cir. 2006).

remedial needs of Hawai'i's native peoples.

The second brief, of the Japanese American Citizens League—Honolulu Chapter, Centro Legal de la Raza and the Equal Justice Society, speaks from the collective voice of racial groups who have experienced racial discrimination. The multiracial organizations argue that Kamehameha Schools' policy does not violate civil rights, but instead restores to Native Hawaiians the education, culture and self-governance that Western colonialism nearly destroyed. The court's *Weber-Johnson* mode of analysis, and specifically its inquiry into "legitimate nondiscriminatory reasons," must therefore take into account the historical context of colonialism and the resulting devastation of the native people.

In the third brief, the Native Hawaiian Legal Corporation, Native Hawaiian Bar Association, and Na 'A'ahuhiwa argue that Kamehameha Schools' policy is a "political" classification rather than a "racial" one because the United States has a special trust obligation to Native Hawaiians as an indigenous people. It contends that Congress also expressly recognized this special relationship when it created a number of programs for the benefit of Native Hawaiians and was fully aware of this special relationship when it reenacted § 1981 in 1991.

Finally, the Hawai'i Civil Rights Commission brief argues that the § 1981 analytical framework developed to remedy civil rights violations is inappropriate to examine the unique history of Native Hawaiians and their distinct claims. It contends, first, that restorative programs, like Kamehameha's, are based on the political rather than the racial status of Native Hawaiians. Second, the brief argues that the *Weber-Johnson* standards were erroneously applied because Kamehameha Schools' policy is not a race-based affirmative action program. Affirmative action programs seek equality and integration, while Kamehameha Schools' policy seeks to restore the self-determination of a formerly sovereign indigenous people.

**AMICUS CURIAE BRIEF OF THE 'ILIO'ULAOKALANI
COALITION IN SUPPORT OF DEFENDANT-APPELLEES'
PETITION FOR REHEARING EN BANC AND IN SUPPORT OF
AFFIRMANCE OF THE DISTRICT COURT'S RULING**

I. INTEREST OF AMICUS CURIAE

Amicus Curiae 'Ilio'ulaokalani Coalition (hereafter 'Ilio'ulaokalani) respectfully submits this brief supporting the petition for rehearing en banc

by Appellee Kamehameha Schools/Bernice Pauahi Bishop Estate (“Kamehameha Schools”). ‘Ilio‘ulaokalani is a grassroots organization comprised of kumu (master teachers) and loea (cultural experts) whose purpose is to link and apply traditional Hawaiian cultural principles, practices and skills to effect educational, social, environmental and economic change for the betterment and advancement of Hawaiians and the community at large. ‘Ilio‘ulaokalani is committed to preserving and protecting Hawaiians’ traditional way of life and ancestral rights.

‘Ilio‘uolalani is responsible for protecting the interests of Kamehameha Schools’ intended beneficiaries (whether admitted or not), by ensuring that the trust is implemented in accordance with Hawaiian customs and traditions.* Kamehameha Schools’ admissions preference is an expression of self-determination by and for Hawaiians, involving uniquely indigenous interests, such as land, membership, self-government, and culture.

II. SUMMARY OF ARGUMENT

The unique historical context of the Hawaiian Islands raises exceptionally important questions justifying en banc rehearing of this case. Beyond the extensively documented (and undisputed) facts below, this Court should consider the historical circumstances surrounding the formation of Kamehameha Schools.

As the embodiment of an ali‘i (chiefs) trust, Kamehameha Schools fulfills special responsibilities owed under Hawaiian custom and tradition. The trust is both a Hawaiian asset and an expression of self-determination, which should not be constrained by applying a civil rights statute that:

- expressly did not apply at the time Ke Ali‘i Bernice Pauahi Bishop’s will was created (1883/1884); and
- has never before been enforced against a private, charitable educational institution that receives no federal funds, and which (a) was formed using the private lands of a pre-existing sovereign, (b) serves native peoples, and (c) addresses the remedial needs of its intended beneficiaries.

III. ARGUMENT

Historical context must not be ignored when analyzing racial discrimination claims. *Doe v. Kamehameha Schools*, 295 F. Supp. 2d 1141, 1148 nn.4-5, 1164, 1166 & 1173 (D. Haw. 2003) (citing cases). By comparison, the Panel majority’s opinion is alarmingly devoid of such

* ‘Ilio‘ulaokalani gratefully acknowledges the contributions to this brief made by recent Hawaiian law school graduates Kanale Sadowski, Beau Bassett, and Sharla Manley.

context. Likewise, Appellant's disparaging argument that it "did not bother to dispute" the context provided below "on the ground that it was legally irrelevant" (Appellant's Reply Brief, at 2 n.1), compounds the historical denigration of Hawaiian cultural identity through western influences. *See generally* NOENOE K. SILVA, *ALOHA BETRAYED* (2004); TOM COFFMAN, *NATION WITHIN* (1998). Far from irrelevant, the unique history of Hawai'i is a critical consideration.

A. CONTEXT MATTERS: SPECIAL RESPONSIBILITIES OF THE ALI'I, BASED ON HAWAIIAN CUSTOMS AND TRADITIONS

The District Court properly recognized that Pauahi's "bequest of her vast estate . . . reflected the Ali'i[] tradition of providing and caring for others." 295 F. Supp. 2d at 1154 (footnote omitted). Traditionally, both the ali'i (chiefs) and the maka'āinana (commoners) possessed corresponding duties to care for the land, rather than ownership of it. Upon uniting the islands, Kamehameha I concentrated the greatest responsibilities amongst his most trusted advisors (Ali'i Nui). During the transition from communal to private ownership (Mahele), the King obtained title to 2.5 million acres of land, 1 million of which he retained personal ownership and 1.5 million of which he granted to the government. Of the total 1.6 million acres granted to a combined 245 individual ali'i, the majority of this land was granted to 10 Ali'i Nui.

Both the King and the ali'i demonstrated that they believed they owned legal title on behalf of the people who owned equitable title. Besides recognizing that the people held a one-third interest in the land,¹ the King, government, and ali'i always took title to the land "subject to the rights of tenants"—*i.e.*, the people. 2 RLH, at 2152.² In addition, the Kuleana Act recognized commoners' rights to take needed resources from ali'i lands. 2 RLH, at 2142.

As Westerners came to control most of the Kingdom's land and native people were dying off, the ali'i trusts (King Lunalilo, Queen Emma, Princess Pauahi, and Queen Lili'uokalani) reinforced traditional Hawaiian obligations. Those who had no children willed their lands to siblings and cousins in turn, with the bulk passing to Ke Ali'i Ruth Ke'elikolani. When Princess Ke'elikolani died on May 24, 1883, she conveyed 353,000 acres to her cousin Pauahi. Because she was the last of the main Kamehameha line, Pauahi put these lands, along with smaller amounts inherited from her parents and others, into a trust "for the school dedicated to the education

¹ 2 Revised Laws of Hawai'i, at 2124 & 2126 (1925) ("RLH").

² *See also* Public Access Shoreline Hawaii v. Hawai'i County Planning Comm'n, 903 P.2d 1246, 1261 n.24, 1262 n.27, 1263 n.29 & 1267 n.35 (Haw. 1995), *cert. denied*, 517 U.S. 1163 (1996).

and upbringing of Native Hawaiians.” *Burgert v. Lokelani Bernice Pauahi Bishop Trust*, 200 F.3d 661, 663 (9th Cir. 2000). In other words, the Kamehameha Schools were established as a private educational institution, pursuant to a charitable testamentary trust, by “a true Hawaiian” seeking to uplift “her own people” for “lasting benefit to her country.” 295 F. Supp. 2d at 1155.

B. SECTION 1981 WAS NOT INTENDED TO BE APPLIED UNDER THESE CIRCUMSTANCES

As the District Court expressly recognized, “Kamehameha Schools was established before Hawai‘i became part of the United States[.]” 295 F. Supp. 2d at 1154. Moreover, “[w]hen Congress first enacted section 1981 in 1866, the Hawaiian Islands were still a sovereign kingdom.” *Doe v. Kamehameha Schools*, No. 04-15044, slip op., 8963 (9th Cir. Aug. 2, 2005) (Graber, J., dissenting). Thus, Kamehameha Schools is not an American institution.

Upon its enactment, the Civil Rights Act of 1866 expressly applied to “all persons born in the United States and **not subject to any foreign power**, excluding Indians not taxed.” 14 Stat. 27. As reenacted by the Enforcement Act of 1870, the statute’s provisions apply to “all persons within the jurisdiction of the United States.” 16 Stat. 141. Thus, under its plain language, the Enforcement Act of 1870 did not apply to Pauahi’s will as executed under Hawaiian Kingdom law in 1884.

Moreover, the District Court twice noted that “Congress . . . explicitly recognized the important role played by Kamehameha Schools as a **Native Hawaiian educational institution**.” 295 F. Supp. 2d at 1168 & 1174 (emphasis added) (citing 20 U.S.C. §§ 7512, 7515 & 7517; 42 U.S.C. §§ 11701-11714; Augustus F. Hawkins-Robert T. Stafford Elementary and Secondary School Improvement Amendments of 1988, Pub. L. No. 100-297, tit. IV, §§ 4001-4008, 102 Stat. 130, 359-63; Improving America’s Schools Act of 1994, Pub. L. No. 103-382, tit. IX, §§ 9201-9212, 108 Stat. 3518, 3794-3805; H.R. Rep. No. 107-63(I), at 732).

More specifically, Kamehameha Schools is an expression of self-determination by and for Hawaiians, consistent with their rights as the Indigenous peoples of Hawai‘i. Like other Indigenous peoples, Hawaiians’ inherent sovereignty pre-dates the U.S. Constitution and thus is “unconstrained by those constitutional provisions framed specifically as limitations on federal or state authority.” *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 56 (1978). *Cf. Wablol v. Villacrusis*, 908 F.2d 411 (9th Cir. 1990) (upholding racial restriction on alienation of land “in view of the importance of the ownership of land for the culture and traditions of the people of the Northern Mariana Islands . . . and to promote their economic advancement and self-sufficiency”). For analogous reasons, the integrity of

Hawaiian assets vital to their culture and traditions (including, but not limited to, the Kamehameha Schools) should not be constrained by blind application of § 1981.

Instead, this honorable Court should be mindful of *Trustees of Dartmouth College v. Woodward*, 17 U.S. (4 Wheat.) 518 (1819), which recognized that the government could not violate property rights by altering the Dartmouth College charter contrary to its founders' intent. Although *Dartmouth* was decided under Article I, section 10 of the Constitution (the contract clause) as applied to states, almost two hundred years later, this court owes no less of an obligation to Pauahi to:

- “most seriously examine” her intent (*id.* at 630-31);
- ensure the “perpetual application” of the trust property “to the objects of its creation” (*id.* at 641); and,
- refrain from “subverting” a most sacred contract between Pauahi and her people. *Id.* at 653.

As explained by Justice Story, forced redistribution of private assets unlawfully interferes with contract and property rights:

If a grant of land or franchises be made to A., in trust for special purposes, can the grant be revoked, and a new grant thereof be made to A., B., and C., in trust for the same purposes, without violating the obligation of the first grant? . . . The common sense of mankind will teach us, that all these cases would be direct infringements of the legal obligations of the grants to which they refer; and yet they are, with no essential distinction, the same as the case now at the bar.

Id. at 711-12 (J. Story, concurring). The Panel majority's ruling is precisely the type of forced redistribution of private assets found unconstitutional in *Dartmouth College*, effectively redistributing Pauahi's property from her intended “objects” and beneficiaries—the Hawaiian people—to Doe.

The Kamehameha Schools do not “trammel” the rights of others. Instead, they perpetuate the ali'i legacy in accordance with cultural customs, traditions, and identities—to the detriment of no one, but to the benefit of our multi-cultural nation as a whole.

C. CONTEXT MATTERS: HISTORICAL CONDITIONS SURROUNDING THE FOUNDATION OF KAMEHAMEHA SCHOOLS

By failing to acknowledge significant historical conditions surrounding the creation of Pauahi's will, the Panel majority obscures an irony apparent to all who know Hawai'i's history. Notwithstanding United States recognition of Hawai'i's independence between 1826 and 1893, this period was marked by a continuing process of accommodation to and struggles with foreigners over land, religion, and sovereignty. An

underlying current of racist beliefs contributed to a public discourse of “enlightened” civilization and salvation through labor, as compared with demeaning characterizations of purportedly “lazy,” “savage,” “barbaric,” “degraded,” “ignorant,” “incompetent,” and “inferior” native people. ALOHA BETRAYED, at 51-54, 59-61 & 72-73.

Amidst this struggle, a Hawaiian nationalist press emerged in the 1860s to express pride in Hawaiian language and culture, while countering the colonial argument that “progress” meant becoming more like Americans or Europeans. *Id.* at 54-86 & 95. Hawaiian language publications of mo‘olelo (stories), mele (songs), hula (dance) and mo‘okū‘auhau (genealogies), represented conscious attempts to retain a sovereign identity. *Id.* at 66.

Nevertheless, the 1887 “Bayonet Constitution”—signed under threat of violence—resulted in an oligarchy under which wealthy white resident aliens could vote, but working class Hawaiians and Asian immigrants could not (also removing provisions concerning the inviolability of Crown lands).³ *Id.* at 126-28; *see also* Ralph S. Kuykendall, THE HAWAIIAN KINGDOM: 1874-1893, at 370 (1967) (noting that the Bayonet constitution “reduced the Hawaiians to a position of . . . **actual inferiority** in the political life of the country”) (emphasis added). Hawaiian subjects responded by petitioning their last King and Queen to reinstate former constitutional provisions. However, the oligarchy seized upon the Queen’s (aborted⁴) efforts to respond to her subjects as an excuse for the illegal overthrow in 1893.

Four years later, more than half (between 21,000 and 38,000) of the total Hawaiian population (about 40,000) signed petitions used to defeat a proposed Treaty of Annexation in Congress. ALOHA BETRAYED, at 124, 149 & 151. However, Congress nevertheless annexed Hawai‘i via Joint Resolution during the 1898 Spanish-American War.

Kamehameha Schools address the devastating impacts of these actions, in part, by seeking to restore the importance and value of Hawaiian culture, language and identity. Thus, the “irony” of applying § 1981 is even greater than the District Court identified. 295 F. Supp. 2d at 1164-65. Considered against the historical context presented above, Kamehameha Schools’ Native Hawaiian preference clearly does not violate § 1981.

³ Compare Kingdom of Hawaii Constitution, article 39 (1864) (“The King’s private lands and other property are inviolable.”).

⁴ Absent the constitutionally required consent of her Cabinet—*see* Kingdom of Hawaii Const., art. 41 (1887) (requiring countersignature of a Cabinet member for any act by the monarch to be effective)—Lili‘uokalani first delayed for several hours, then cancelled, an elaborate public ceremony on January 14, 1893, during which she planned to promulgate a new constitution. Kuykendall, at 582-85.

IV. CONCLUSION

‘Ilio‘ulaokalani respectfully requests that the Court grant Kamehameha Schools’ petition and affirm the District Court’s decision.

DATED: Honolulu, Hawai‘i, August 29, 2005.

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**AMICUS BRIEF OF THE JAPANESE AMERICAN CITIZENS
LEAGUE OF HAWAII‘I-HONOLULU CHAPTER, CENTRO LEGAL
DE LA RAZA, AND THE EQUAL JUSTICE SOCIETY IN
SUPPORT OF DEFENDANTS-APPELLEES’ PETITION FOR
REHEARING EN BANC**

INTEREST OF AMICI

The Japanese American Citizens League of Hawai‘i, Honolulu Chapter (JACL), seeks protection of civil and human rights regardless of race, creed, color, national origin, or sex.

Centro Legal de la Raza advances the rights of low-income and Spanish-speaking communities, and empowers the community to assert its rights in order to create a just and fair society for everyone.

The Equal Justice Society (EJS) is a national organization of scholars, advocates and individuals advancing innovative legal strategies and public policy for enduring social change.

ARGUMENT

- I. KAMEHAMEHA SCHOOLS’ ADMISSIONS POLICY DOES NOT VIOLATE CIVIL RIGHTS; RATHER, IT SERVES TO RESTORE TO NATIVE HAWAIIANS THAT WHICH 19TH AND 20TH CENTURY “WESTERN INFLUENCE” NEARLY DESTROYED: HAWAIIAN EDUCATION, CULTURE AND A MEASURE OF SELF-GOVERNANCE.**

As non-Hawaiian civil rights organizations, amici JACL-Hawai'i, Centro Legal de la Raza, and the Equal Justice Society write to say that the Kamehameha Schools admissions policy favoring Hawaiian children does not transgress civil rights. We have seen the harsh reality of racism and have fought hard for equal justice under law. African-Americans suffered slavery, segregation and present-day discrimination in jobs and housing. Asian-Americans and Latinos faced racialized immigration exclusion, alien land and anti-miscegenation laws, the internment and current treatment as perpetual foreigners. We have experienced the pain of civil rights violations. And we can say that the Kamehameha Schools admissions policy is not about unfair treatment based on race.

Doe's suit is not, as some suggest, about trying to end a program comparable to Jim Crow segregation in the South. Rather, the suit is about an effort to break apart a successful educational program by Hawaiians for Hawaiians that aims to repair the continuing harms of the 19th and 20th century "influx of Western civilization." *Doe v. Kamehameha Sch.*, 295 F. Supp. 2d 1141, 1147 (D. Hawai'i 2003).

The Kamehameha Schools were created in 1883, fifteen years before the United States annexed Hawai'i, by the private trust of Princess Bernice Pauahi Bishop, the last descendant of Hawai'i's first king. Pauahi Bishop created the trust to uplift Hawaiian children through education because the forces of Westernization had nearly decimated the Hawaiian people (a population drop from 400,000 to 45,000) and foreshadowed the American takeover of the Hawaiian government. *See id.* at 1146, 1155; George E. Stannard, *BEFORE THE HORROR: THE POPULATION OF HAWAI'I ON THE EVE OF WESTERN CONTACT* (1989). Pauahi Bishop sought not to exclude others by labeling them inferior or unworthy (a classic civil rights violation) but rather to rebuild her own people (an act of restoration and self-determination).

Pauahi Bishop's grasp of the urgency of changing circumstances proved prescient. In 1893, the U.S. assisted in the illegal overthrow of the sovereign Hawaiian nation. American military and plantation owners lobbied hard for annexation, alternatively characterizing indigenous Hawaiians as uncivilized or childlike—in either case, in need of American control.¹ With a military base at Pearl Harbor and a hot commodity (sugar) at stake, the U.S. annexed Hawai'i in 1898 and not only took control of the provisional government, but also took all former Hawaiian government and royal lands. The beloved former queen was imprisoned for "treason."

¹ *See* Lilikala Kame'eleihiwa, *NATIVE LAND AND FOREIGN DESIRES: PEHEA LA E PONO AI?* 305 (1992) (account of characterization of Hawaiians as "ignorant Natives"); Sally Engle Merry, *COLONIZING HAWAI'I: THE CULTURAL POWER OF LAW* 139 (2000) ("paternalistic racism" characterized Native Hawaiians as "childlike, benign, and foolish").

Hawaiian language was barred from the schools. Plantations diverted water from agrarian Hawaiian communities. More Hawaiians were separated from the land, severing cultural, economic and spiritual connections. See NOENOE K. SILVA, *ALOHA BETRAYED* (2004).

This form of American "westernization" hastened the near-demise of indigenous Hawaiians. Indeed, Congress held hearings on the "Rehabilitation and Colonization of Hawaiians," recommending the Hawaiian Homes Commission Act of 1921 as restorative justice for a "dying race."² Hawaiians in their homeland still bear the worst socioeconomic indicators of all Hawai'i's people—the highest rates of illness, prison incarceration and homelessness, and the lowest rates of higher education and family income. Congress' Apology Resolution of 1993 acknowledged this and commanded the President to apologize for the U.S.'s active role in the "conspiracy" to illegally overthrow the internationally-recognized Hawaiian government and for the ensuing "devastation" of the Hawaiian people. S. Joint Res. 19, Pub. L. No. 103-150, 107 Stat. 1510 (1993).

The Kamehameha Schools admissions policy thus is not about violating civil rights, denigrating one group as inferior to justify better treatment of another. As Judge Kay highlighted in finding a "legitimate nondiscriminatory reason" for the Schools' policy, the School is about a private self-determining effort of restoration for Hawai'i's first people. 295 F. Supp. 2d at 1169, 1172.

II. IN ASSESSING AN INDIGENOUS GROUP'S ATTEMPTS TO RESTORE A MEASURE OF SELF-GOVERNANCE AND CULTURE THROUGH EDUCATION IN THE FACE OF OVERWHELMING "WESTERN INFLUENCE," THE COURT'S INQUIRY INTO "LEGITIMATE NONDISCRIMINATORY REASONS" MUST INCORPORATE THE CONTEXT OF COLONIZATION AND ITS RESULTING "DEVASTATION" OF THE NATIVE PEOPLE.

For these reasons, international human rights principles of self-determination and restoration for indigenous peoples illuminate the "remedial legitimacy" of the Kamehameha Schools admissions policy. See S. James Anaya, *International Human Rights and Indigenous Peoples: The Move Toward the Multicultural State*, 21 ARIZ. J. INT'L & COMP. L. 13, 15 (2004); *Rice v. Cayetano*, 528 U.S. 495, 545 (2000) (Stevens, J.,

² See Hearings on the Rehabilitation and Colonization of Hawaiians, 66th Cong., 2d Sess. (1920); Hawaiian Homes Commission Act of 1920, 42 STAT. 108 (1921); H.R. REP. NO. 66-839, at 2 (1920); *id.* at 4 (testimony of Sen. Wise) ("[T]he Hawaiian people are dying [T]he only way to save them . . . is to take them back to the lands and give them the mode of living [of] their ancestors . . . and in that way rehabilitate them.").

dissenting); U.N. Charter, Chapt. XI, Art.73 (1946) (Hawai'i on U.N. list of colonized territories).

Even if those principles apply only indirectly, the panel majority erred in its mode of remedial analysis in assessing the Kamehameha Schools admissions policy according to unduly narrow affirmative action precepts. Rehearing is warranted for that crucial reason.

Under §1981, "the defendant must come forward with a legitimate nondiscriminatory reason justifying" its policy. *Kamehameha Sch.*, No. 04-15044, slip op. at 8946 (9th Cir. Aug. 2, 2005). What constitutes a "legitimate nondiscriminatory reason" depends upon context, and the majority adopted the wrong mode of contextual analysis.

If an affirmative action diversity program addresses "racial imbalance" in private employment then the narrow *Weber-Johnson* analysis of "racial exclusion," relied on by the panel, is apt. See slip op. at 1849-50 (describing legal framework under *United Steelworkers of Am. v. Weber*, 443 U.S. 193 (1979) and *Johnson v. Transp. Agency*, 480 U.S. 616 (1987)). But, as Judge Kay below recognized, strict application of *Weber-Johnson's* private employment remedy criteria is starkly inappropriate for assessing an indigenous group's attempts to repair through self-education the "devastation" and continuing harms of accelerating "Western Influence," or colonialism—which in 1898 included worldwide U.S. territorial acquisitions of not only Hawai'i but also the Philippines, Puerto Rico and Guam.³ 295 F. Supp. 2d at 1165-66 (strict adherence to the "narrow lens" of employment diversity affirmative action "forces the inquiry to ignore the unique historical context which surrounds Kamehameha Schools, a private educational institution.").

In assessing whether an indigenous group's response to the Congressionally acknowledged "devastation" constitutes a "legitimate nondiscriminatory reason," the Court cannot tightly limit its inquiry, as the panel did, to whether a challenged program effectively excludes other groups. Slip op. at 8950-51. Instead the Court must ask if the indigenous program's use of race or ancestry is "legitimate" in that it does not denigrate other racial groups (treating them as racially inferior or uncivilized) and, most important, is crafted as a restorative response to colonialism's devastation.

That very inquiry lies at the heart of *Morton v. Mancari*, 417 U.S. 535 (1974), in which the Supreme Court found a Native American blood preference to be a "political" restorative measure (even though race was involved) and therefore legitimate. *Id.* at 554 n.24. The fact that the indigenous hiring practice there excluded other racial groups was not determinative. Indeed, race/ancestry had to be an integral factor in the political restoration process because race/ancestry had been key originally

³ Treaty of Paris, Dec. 10, 1898, U.S.-Spain, art. II, III, 30 Stat. 1754, T.S. No. 343.

in the U.S.'s justification for the confiscation of land, the creation of guardian-ward reservations, and the destruction of culture and self-governance (the savage and uncivilized natives had to be conquered and then watched over). See Rennard Strickland, *The Genocidal Premise In Native American Law and Policy: Exorcising Aboriginal Ghosts*, 1 J. GENDER RACE & JUST. 325 (1998).⁴ Although *Mancari* addressed a constitutional challenge, its foundational inquiry into legitimate reasons is directly relevant here.

The majority in this case, however, in its narrow assessment of "legitimate reasons," entirely omitted this analysis. Justices Stevens and Ginsburg have acknowledged the import of this analysis in assessing Native Hawaiian programs. *Rice*, 528 U.S. at 533-35 (Stevens, J., dissenting) (self-determination and "compensat[ion] for past wrongs" principles require considering indigenous ancestry).⁵ Scholars worldwide also acknowledge its salience. International scholar, Albert Memmi, a Tunisian Jew and resister of French colonialism, incisively describes colonization as political "aggression" (taking land and resources and controlling indigenous populations) that is often partially justified through "race."

Since the aggressor portrays itself as civilized and law-abiding, it needs a mechanism for justifying to its people and the world its bald political take-over of another country and its people.⁶ For Memmi, "racism" in this setting is not simple ignorance or skin color prejudice. Rather, it is characterizing people as "different," less worthy or less human "others" (threatening, uncivilized, inferior) to make political "aggression" for economic or military reasons appear necessary.

Given this reality, indigenous political efforts to rectify the devastation of colonization must address race or ancestry as part of the restoration process. This is the jurisprudential foundation for the Supreme Court's *Mancari* decision—regardless of whether the indigenous group is

⁴ See also David H. Getches et al., *Cases and Materials on Federal Indian Law* 103 (5th ed. 2005) (race was the justification by which American Indians were deemed "incapable of . . . assimilation" and a "challenge to white [civilized] society").

⁵ See also *Rice v. Cayetano*, 963 F. Supp. 1547, 1554 (D. Haw. 1997) (Native Hawaiian-only voting requirement "not based upon race, but upon a recognition of the unique status of Native Hawaiians.").

⁶ Memmi describes four steps in the use of race for politically justifying colonization:

- 1) Stressing the real or imaginary differences between the racist and its victim;
- 2) Assigning values to those differences, to the advantage of the racist and the detriment of its victim;
- 3) Trying to make them absolutes by generalizing from them and claiming that they are final; and
- 4) Justifying any present or possible aggression or privilege.

ALBERT MEMMI, ATTEMPT AT A DEFINITION, IN DOMINATED MAN: NOTES TOWARD A PORTRAIT 186 (1968); ALBERT MEMMI, THE COLONIZER AND THE COLONIZED (1965); Robert A. Williams, Jr., *Documents of Barbarism: The Contemporary Legacy of European Racism and Colonialism in the Narrative Traditions of Federal Indian Law*, 31 ARIZ. L. REV. 237, 262 (1989) (applying Memmi's framework to Native Americans).

formally recognized as a “political” minority.⁷ It is reflected in Justices Stevens’ and Ginsburg’s observations about the validity of government-supported Hawaiian programs. It is starkly missing, however, from the majority’s analysis in this case.

Judge Kay correctly determined that the narrow *Weber-Johnson* mode of analysis for employment affirmative action under § 1981 changes substantially when the court is assessing the admissions policy of a private school established by and for the education of an indigenous people to “rectify socioeconomic and educational disadvantages resulting from the influx of western civilization.” 295 F. Supp. 2d at 1147. In finding “legitimate reasons” for Kamehameha Schools’ admissions policy, Judge Kay employed the appropriate mode of analysis: assessing the “unique historical” context of western influence on “Hawaii and Native Hawaiians[,]” including “congressional recognition of the United States’ wrongful involvement in the end of the Hawaiian Monarchy and the need to improve educational opportunities for Native Hawaiians[.]” *Id.* at 1166.

Hawai‘i’s multiracial populace supports Kamehameha Schools because restorative justice for Hawai‘i’s indigenous peoples benefits all.

CONCLUSION

Amici respectfully request that the Court grant the petition.

DATED: August 30, 2005

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BRIEF OF AMICI CURIAE NATIVE HAWAIIAN LEGAL CORPORATION, NATIVE HAWAIIAN BAR ASSOCIATION, AND NA ‘A‘AHUHIWA IN SUPPORT OF PETITION FOR REHEARING

⁷ *Mancari* referred to formally recognized “Indian tribes” as “political” minorities. 417 U.S. at 554. An indigenous group’s lack of formal government recognition, however, does not undercut the import of *Mancari*’s foundation for assessing “legitimate” reasons under §1981. *See also Kamehameha Sch.*, slip op. at 8963-67 (Graber, J., dissenting) (citing many Congressional remedial acts based on the special relationship between the U.S. and Hawaiians even without formal recognition).

I. INTEREST OF AMICI CURIAE

Amici, Native Hawaiian organizations dedicated to ensuring the continued existence of Hawaiian rights and programs, respectfully submit this brief in support of Kamehameha Schools' Petition for Rehearing En Banc.

Native Hawaiian Legal Corporation is a public interest, non-profit law firm that asserts and defends Native Hawaiian rights to lands and resources, beneficiary rights under public and private Hawaiian trusts, and rights to sovereignty and self-determination. Native Hawaiian Bar Association is an association of lawyers and legal professionals of Hawaiian ancestry that strives for justice and effective legal representation for all people of Hawaiian ancestry. Na 'A'ahuhiwa is an association of retired Native Hawaiian judges organized to advise and advocate on issues affecting Native Hawaiians and Hawai'i.

Amici have a common interest in supporting the legitimate beneficiary structure of the Kamehameha Schools trust. Kamehameha has many programs that serve the entire community, but its Hawaiian ancestry preference for admission to the Schools is based on the wishes of Princess Bernice Pauahi Bishop, who created the charitable trust supporting the Schools. This preference also recognizes that the lands of the trust were the lands of the ali'i (high chiefs) of the Kingdom of Hawai'i, who understood that they held these lands not in a "fee-simple" Western sense, but as trustees, with a fiduciary obligation to the Hawaiian people. *See Reppun v. Board of Water Supply*, 65 Haw. 531, 548 n.14, 656 P.2d 57, 68-69 n.14 (1982) (ali'i in ancient Hawaiian thought similar to trustee).

Those tracing their genealogy to Hawai'i's indigenous people are thus the beneficiaries of these lands in a direct sense and are entitled to a preference for the limited openings at Kamehameha Schools. They have entitlements to the benefits that flow from this charitable trust similar to rights of heirs and beneficiaries of any other estate. The majority ruling, if allowed to stand, would have the effect of radically and detrimentally altering the rights of these Native Hawaiian beneficiaries. Thus Amici urge this Court to grant rehearing en banc and reverse the majority decision of the panel.

II. ARGUMENT

A. THIS COURT SHOULD CONSIDER WHETHER KAMEHAMEHA'S ADMISSIONS POLICY RELIES ON A "POLITICAL" OR "RACIAL" CLASSIFICATION

Whether Kamehameha's admissions policy employs a political classification, rather than a racial one, is an issue that is properly before,

and should be considered by, this Court en banc. Kamehameha's Petition for Rehearing, at 7-9, and the Amicus Curiae Memorandum of the State, at 9-12, fully address the issue of whether Kamehameha conceded that its admissions policy was based solely on race and those arguments will not be reiterated here. It is important to note, however, that from the beginning of this lawsuit Kamehameha has argued that the policy does not discriminate on the basis of race. In answer to the complaint, and in the amended answer, Kamehameha admitted the "preference in its admissions policy for children of Hawaiian ancestry" but clearly asserted that "its admissions policy does not discriminate on the basis of race." Answer ¶¶ 2, 20 (7/16/03); Amended Answer ¶¶ 2, 21 (9/24/03).

Kamehameha has consistently relied on the status of Native Hawaiians as indigenous peoples in assessing the validity of the admissions policy. See Petition for Rehearing at 8 n. In the district court and in this Court, Kamehameha relied on Congress's determination that benefits are extended to Native Hawaiians not "because of their race, but because of their unique status as the indigenous people of a once sovereign nation as to whom the United States has established a trust relationship." 20 U.S.C. § 7512(12)(B) (education); 25 U.S.C. § 4221 note (housing). See, e.g., Transcript of Argument, 11/4/04, at 30; Mem. in Support of Defendants' Motion for S.J. at 27-28.

Even if Kamehameha had conceded that its admissions policy was a racial classification, "[when an issue or claim is properly before [a] court, the court is not limited to the particular legal theories advanced by the parties, but rather retains the independent power to identify and apply the proper construction of governing law." *Kamen v. Kemper Fin. Servs., Inc.*, 500 U.S. 90, 99 (1991). This Court can, and should, "consider an issue 'antecedent to . . . and ultimately dispositive of' the dispute before it, even an issue the parties fail to identify and brief." *US. Nat'l Bank of Oregon v. Indep. Ins. Agents of Am., Inc.*, 508 U.S. 439, 447 (1993).

Consequently, even if not "discretely" identified, the legal question of whether the admissions policy is based on a political or racial classification is "inextricably linked" to the question of liability under 42 U.S.C. § 1981, and thus should be appropriately resolved by this Court in an en banc rehearing. See *City of Sherrill v. Oneida Indian Nation*, 125 S. Ct. 1478, 1490 n.8 (2005); see also *Ballard v. C.I.R.*, 125 S. Ct. 1270, 1275 n.2 (2005) (addressing "a question anterior to all other [issues] the parties raised" even though "the parties did not discretely refer to the ground on which our decision rests").

B. KAMEHAMEHA'S ADMISSIONS PREFERENCE RELIES ON A "POLITICAL" CLASSIFICATION

Kamehameha's admissions preference is based on a "political"

classification rather than a “racial” one, because the United States has recognized repeatedly that it has a political relationship with and a special trust obligation to Native Hawaiians as the indigenous people of Hawai‘i.¹ See, e.g., 20 U.S.C. § 7512(12); 42 U.S.C. § 11701(18)-(2). Courts have accepted for decades that preferences for Native Americans are subject only to rational-basis judicial scrutiny, because they are based on a “political” classification rather than a “racial” classification. This results from the unique political relationship between the United States and natives, even when the native groups are defined by genealogy or ancestry. See, e.g., *Morton v. Mancari*, 417 U.S. 535 (1974); *Antoine v. Washington*, 420 U.S. 194 (1975); *Moe v. Confederated Salish and Kootenai Tribes of Flathead Indian Reservation*, 425 U.S. 463 (1976); *United States v. Antelope*, 430 U.S. 641, 645 (1977). Under this approach, courts review special treatment of natives only to determine whether the programs are “tied rationally to the fulfillment of Congress’s unique obligation” toward the native group. *Mancari*, 417 U.S. at 555.

This Court recently applied rational-basis review to laws excluding Native Hawaiians from applying for federal tribal recognition, explicitly accepting the argument that “the classification is politically based.” *Kahawaiolaa v. Norton*, 386 F.3d 1271, 1278 (9th Cir. 2004). That decision emphasized that Congress was entitled to treat Native Hawaiians under separate and distinct legislation because of “the unique history of Hawai‘i,” *Id.* at 1281-82, explaining that it was entirely understandable that “Congress has established a program of federal benefits and entitlements for native Hawaiians that is different” from those for other native groups. *Id.* at 1282.

If this Court has concluded that the classification between Native Hawaiians and other Native Americans is a “political” classification and that courts should defer to Congressional determinations regarding the different programs established for different native groups, then it necessarily follows that the admissions policy of a school established when the Kingdom of Hawai‘i was a co-equal sovereign of the United States should also be evaluated under rational-basis review applicable to political classifications. The majority opinion however, engaged in no such analysis, summarily concluding that Kamehameha acknowledged the admissions policy to be a racial classification.

Kamehameha may have acknowledged that genealogy or ancestry is a component of the admissions policy, but that is certainly not the same as acknowledging that it utilizes a “racial” classification. Classifications

¹ There is no question that Native Hawaiians are indigenous people. The Supreme Court in *Rice v. Cayetano*, 528 U.S. 495 (2000), acknowledged repeatedly that Native Hawaiians are indigenous people by referring to them as “the native population,” *id.* at 506, and “the native Hawaiian population,” *id.* at 507.

involving native peoples frequently involve a genealogical, ancestral, or “racial” component, but they are nonetheless characterized as “political.”

This judicial acceptance of the “political” classification is best demonstrated by examining *Mancari*. The *Mancari* preference was not free of “racial” components, because an individual had to have “one fourth or more degree Indian blood” to qualify for the preference. 417 U.S. at 554, n.24. The Supreme Court was thus dealing with a mixed political/racial category, but it nonetheless concluded that “rational-basis” review should apply because the prominent feature of this category was the “political” relationship between the native people and the United States.

The majority in this case relied heavily on the Indian tribal affiliation noted in the *Mancari* decision. Slip op. at 8956. But the Supreme Court’s decisions after *Mancari* demonstrate that the Court itself did not view *Mancari* in the same restrictive light. In *Delaware Tribal Business Committee v. Weeks*, 430 U.S. 73 (1977) and *United States v. John*, 437 U.S. 634 (1978), the Court upheld, under rational-basis review, benefits and legislation affecting individual Indians not organized into formal tribes.

Weeks involved a statute distributing assets to the heirs of two recognized tribes, but the heirs receiving benefits did not themselves have to be tribal members. 430 U.S. at 82, n.14. Without making any special comment on the fact that benefits went to nontribally-affiliated individuals, the majority opined that Congress was free to “expand a class of tribal beneficiaries entitled to share in royalties from tribal lands.” *Id.* at 84. The *John* decision ignored the supposedly crucial distinction between tribal and nontribal Indians, applying rational-basis review to Congressional action establishing separate criminal laws for Mississippi nontribal Indians who were a mere “remnant of a larger group of Indians” that had moved to Oklahoma. 437 U.S. at 653.

This Court applied the *Mancari* rational-basis standard in *Alaska Chapter, Associated General Contractors v. Pierce*, 694 F.2d 1162 (9th Cir. 1982), in upholding a Congressional program allowing preferences to all “Indian organizations and Indian-owned economic enterprises” (without regard to tribal membership) bidding on HUD contracts.

Based on these long-established precedents, the Kamehameha admissions preference must be viewed as one that utilizes a “political” rather than a “racial” classification, not implicating 42 U.S.C. § 1981.

C. CONGRESS HAS RECOGNIZED THE UNIQUE STATUS OF NATIVE HAWAIIANS AND 42 U.S.C. § 1981 SHOULD BE HARMONIZED WITH CONGRESSIONAL POLICY

Judge Graber’s dissent points out that the 1866 Civil Rights Act was enacted while “the Hawaiian Islands were still a sovereign kingdom,” Slip op. at 8963, and that when Congress reenacted this statute in 1991 it was

cognizant of the laws enacted in the interim, *including* Congress's explicit approval of the important role Kamehameha has played in educating Hawaiian children and protecting Hawaiian culture. *Id.* at 8964. She explained, "the inescapable conclusion from the statutory context is that in 1991 Congress intended that a preference for Native Hawaiians, in Hawaii, *by a Native Hawaiian organization, located on the Hawaiian monarchy's ancestral lands*, be upheld because it furthers the urgent need for better education of Native Hawaiians." *Id.* at 8966. (emphasis added).

The majority, however, dismissed the importance of the many statutes Congress has passed recognizing the special trust relationship between Native Hawaiians and the U.S. *Id.* at 8953; *id.* n.10. The majority recognized that its duty was to interpret "what Congress may do and has done," *id.* at 8953, but it nonetheless refused to do just that. Even while acknowledging the many Congressional preferential enactments for Native Hawaiians, *id.* at 8957-60,² the majority refused to recognize their legal significance.

Although Congress has chosen to treat Native Hawaiians differently from other Native Americans, Congress has clearly determined that separate and preferential programs for Native Hawaiians are consistent with their "unique status as an indigenous people of a once sovereign nation." 20 U.S.C. § 7512(12)(B). In accord with that determination, Congress recently established the Office of Native Hawaiian Relations within the Secretary of Interior's office to implement the "special legal relationship between the Native Hawaiian people and the United States" and "continue the process of reconciliation with the Native Hawaiian people." Consolidated Appropriations Act of 2004, 118 Stat. 3, div. H, § 148 (2004).

Had the majority been willing to interpret "what Congress may do and has done," it should have harmonized Congressional policy recognizing the political status of the Native Hawaiian people with 42 U.S.C. §1981 and upheld Kamehameha's admissions policy.

III. CONCLUSION

For the foregoing reasons, this court should grant the Petition for Rehearing En Banc and reverse the majority decision of the three-judge panel.

DATED: Honolulu, Hawai'i, August 29, 2005.

² Indeed, the majority noted, "Congress has asserted that the United States has a political relationship with, and a special trust obligation to, native Hawaiians as the indigenous people of Hawai'i." Slip op. at 8959-60.

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BRIEF OF AMICUS CURIAE HAWAI'I CIVIL RIGHTS COMMISSION

I. INTEREST OF AMICUS CURIAE

The Hawai'i Civil Rights Commission ("HCRC") is responsible for enforcing state laws prohibiting discrimination in employment, housing, public accommodations, and state-funded services. Hawai'i Revised Statutes ("HRS") Chapter 368, part I. HCRC exercises jurisdiction over complaints against public and private educational institutions as employers, operators of public accommodations, and operators of residential housing.¹

Hawai'i's civil rights laws arise from our state constitution, which provides that "[n]o person shall . . . be denied the enjoyment of the person's civil rights or discriminated against in the exercise thereof because of race, religion, sex or ancestry." Haw. Const., art. I, § 5. This provision was adopted at the 1950 Constitutional Convention, by delegates with strong civil rights concerns stemming from personal experiences with *de jure* and *de facto* discrimination under Hawai'i's segregated, plantation past. *See generally* LAWRENCE H. FUCHS, HAWAII PONO: A SOCIAL HISTORY (1961).

Established in January 1991, HCRC has accepted/processed over 8,000 complaints of discrimination. HCRC has experience and expertise interpreting civil rights statutes, particularly with respect to employment, and is familiar with the burden-shifting analysis used to infer discriminatory intent. *See, e.g., McDonnell-Douglas Corp. v. Green*, 411 U.S. 792 (1973). HCRC is also familiar with Native Hawaiian history. HCRC's understanding of these issues is based on 14 years of experience, investigation and research into Native Hawaiian history, Native Hawaiian rights litigation, the purpose and context of Native Hawaiian programs, as

¹ However, HCRC does not exercise jurisdiction over complaints of discrimination in public or private school education. Accordingly, it does not accept, investigate or administratively adjudicate complaints involving claims of discrimination in admissions, discipline, grading, or misconduct by or against students.

well as the history of discrimination and the civil rights movement in Hawai'i.

Among its powers and functions, HCRC is authorized to hold public hearings and issue publications that promote goodwill and minimize or eliminate discrimination. *See* HRS §§ 363-3(2), (6). Shortly after its formation, HCRC convened a public conference in December 1991 to, *inter alia*, assess the status of civil rights in our State. *See* Declaration of John Ishihara; Exhibit A. One issue addressed was the relationship between civil rights and Native Hawaiian rights to self-determination. An expert legal panel testified that these rights are distinct. Native Hawaiians are indigenous people whose nation was overthrown by American interests, then annexed by the United States.² Native Hawaiians lost their government, lands, language, traditions and cultural practices, resulting in near extinction of their population and severe, continuing socioeconomic and educational deficits.³ Recognizing this sad and unjust history, the federal and state governments entered into a special political relationship and trust obligation with Native Hawaiians (as a formerly sovereign and indigenous people), and established numerous programs to rehabilitate them.⁴ In this context, the goal of remedial programs for Native Hawaiians is to restore self-determination, not equality.

In September 1993, HCRC also held public hearings on whether to expand its jurisdiction to include discrimination based on race, religion, sex or national origin in access to state and state-funded programs and services. *See* Declaration of John Ishihara, Exhibit B. Community members and legal experts testified concerning the effects of current and proposed state civil rights laws on restorative programs for Native Hawaiians. The speakers reiterated that these programs are based on Native Hawaiians' political status as indigenous peoples, not race. *See Morton v. Mancari*, 417 U.S. 535 (1974); *Ahuna v. Dept. of Hawaiian Home Lands*, 640 P.2d 1161, 1167-69 (Haw. 1982).

Based on the history, legal authorities and analysis presented at the 1991 conference and 1993 public hearings, HCRC determined that restorative programs for Native Hawaiians neither implicate nor violate federal or state civil rights laws.

² *See generally* Doe v. Kamehameha Sch., 295 F.Supp. 2d 1141, 1147-50 (D. Haw. 2003).

³ *Id.* at 1150-51.

⁴ *Id.* at 1151-54. The State's recognition of Native Hawaiians' special status as indigenous people can be further found in constitutional and statutory provisions affirming and protecting the traditional and customary rights of Native Hawaiians, as well as those incorporating federal provisions expressly designated for the benefit of Native Hawaiians. Haw. Const. art. XII, §1-7, art. XV, § 4 & art. XVI, § 7; HRS 1-1, 7-1. *See also* Act of March 18, 1959, Pub.L. No. 86-3, 73 Stat. 4, § 4 and 5(f) (the "Admission Act").

II. SUMMARY OF ARGUMENT

Section 1981 does not apply to this case. Restorative programs for Native Hawaiians, including Appellees' admissions policy, are based on the political status of Native Hawaiians as formerly sovereign, indigenous peoples to promote self-determination and self-governance.

Alternatively, because Appellees' admissions policy is not a race-based affirmative action program, standards for determining whether affirmative action programs constitute legitimate non-discriminatory reasons for adverse employment action, *United Steelworkers of America v. Weber*, 443 U.S. 193 (1979), and *Johnson v. Transportation Agency*, 480 U.S. 616 (1987), do not apply here. Appellees' admissions policy is, instead, a restorative program for indigenous people.

III. ARGUMENT

A. SECTION 1981 DOES NOT APPLY

This case is about two very different histories, (1) a Hawaiian story of a Princess's bequest to her people, and (2) an American story of emancipated slaves, their descendants, and an ongoing struggle for equality. By forcing the first story into an analytical framework developed to remedy the second story, the panel majority created an absurd and unjust result.

Native Hawaiians' loss of nationhood, special political status and restorative programs established for them as indigenous people differ significantly from the history of discrimination addressed by civil rights laws. Native Hawaiian rights are distinct from civil rights claims, and must be analyzed accordingly.

1. First Story: A Legacy for Native Hawaiians

At her death in 1884, Princess Bernice Pauahi Bishop (the last remaining direct heir of King Kamehameha I) left a gift of her lands to her people. The Princess was one of several royal heirs who left trusts for their people's benefit.⁵

These Ali'i (chiefs) acted out of concern for the survival of Native Hawaiians, whose population diminished from an estimated 400,000 to

⁵ Historically, there was no private land ownership in Hawai'i until the 1848 Mahele. Land was previously held and controlled by the King and Chiefs in trust for the benefit of all, and was not subject to alienation. Hawaiian culture and life, as for many indigenous peoples, was based on a fundamental relationship to the land and water. *Public Access Shoreline Hawai'i v. Hawai'i County Planning Comm'n*, 903 P.2d 1246, 1263-67 (Haw. 1995), cert. denied, 517 U.S. 1163 (1996); *Robinson v. Ariyoshi*, 658 P.2d 287, 310 n.33 (Haw. 1982).

1,000,000 people at the time of first contact, to fewer than 40,000 about one hundred years later. Sadly, their concerns and premonitions proved true in many respects. By 1893, the Hawaiian Kingdom had been illegally overthrown. The United States later annexed the islands in 1898, turning Hawai'i into an American colony.⁶ Hawaiians were dispossessed of their land, language and culture. By 1920, their population had fallen to 28,000.

Today, Native Hawaiians continue to suffer adverse effects due to "western influences." But remedial efforts by Congress, the State, and private entities have provided hope and support. The Ali'i trusts (including Kamehameha Schools) remain a cornerstone of these efforts.

2. Second Story: The Struggle for Civil Rights in America

This is a uniquely American story involving several chapters: slavery, the Civil War and emancipation, reconstruction, Jim Crow, and the civil rights movement. Slavery has played a crucial role in our history, from conquistador enslavement of native peoples to the massive trade of African slaves. Our Founding Fathers incorporated and acknowledged the importance of slavery (and its economic/political significance) in the Constitution, counting slaves as 3/5ths of a person for representation purposes. But abolitionist activism coupled with strained economic relations between the industrial North and agricultural South, ultimately led to Civil War.

At the end of the Civil War, the U.S. Constitution was amended to outlaw slavery (13th Amendment), guarantee due process and equal protection (14th Amendment), and the right to vote (15th Amendment). In order to ensure the rights of freed men during post-war Reconstruction, Congress passed the Civil Rights Act of 1866 (including § 1981). But Reconstruction was compromised, then abandoned, giving rise to Jim Crow laws codifying segregation. The Reconstruction civil rights statutes were largely forgotten until revived during the modern Civil Rights Movement.

In the mid-1900's, America was forced to face the race and justice issues posed by segregation. This struggle was motivated by a desire for equality, integration and diversity, resulting in enactment of the Civil Rights Act of 1964, including Title VII's prohibition against racial discrimination in employment. The Supreme Court developed its *McDonnell-Douglas* framework for proving Title VII discrimination and, subsequently, applied this test to § 1981 race discrimination claims in *Patterson v. McLean Credit Union*, 491 U.S. 792 (1973).

⁶ United Nations General Assembly Resolution 66(1), Transmission of Information under Article 73(e) of the Charter, December 14, 1946.

B. RECONCILING THE TWO STORIES

These two stories—both sad, yet uplifting—are different, but can be reconciled. However, this lawsuit inappropriately focuses on application of legal standards—developed to ferret out and prove racial discrimination in the civil rights context—to a restorative program designed to address harms caused by denial of native rights.

1. “Native Hawaiians” is a political status, not a racial classification.⁷

Congress has recognized the unlawful involvement of the United States in the overthrow of the Hawaiian constitutional monarchy. S. Joint Res. No. 19, Pub. L. No. 103-150, 107 Stat. 1510 (1993) (hereinafter “Apology Resolution”). The Apology Resolution specifically acknowledges that the overthrow resulted in “the suppression of the inherent sovereignty of the Native Hawaiian people,” and “the deprivation of the rights of Native Hawaiians to self-determination.” It also demonstrates Congress’s recognition that Native Hawaiians constitute a political group with legitimate claims to sovereignty and the right to self-determination.

Congress has further recognized Native Hawaiian political rights under a plethora of laws, including one supporting Native Hawaiian education programs. “The United States has recognized and reaffirmed that . . . Congress does not extend services to Native Hawaiians because of their race, but because of their unique status as the indigenous people of a once sovereign nation as to whom the United States has established a trust relationship.” 20 U.S.C. § 7512(12). The import and significance of these federal laws were not properly considered by the majority panel, and this failure requires that the Court grant the petition for rehearing.

Based on the political status of Native Hawaiians, Appellees’ admission policy does not constitute race discrimination under § 1981.

2. The affirmative action test does not apply to restorative programs for formerly sovereign indigenous people.

Assuming that § 1981 analysis is appropriate, HCRC contends the Panel majority should not have applied the *Weber/Johnson* standards. As applied, the Title VII/§ 1981 analytical framework makes no sense here. Standards for considering whether affirmative action programs constitute legitimate non-discriminatory reasons do not fit, because Appellees’ admissions policy is not a race-based affirmative action program. *See, e.g.,*

⁷ *See* 295 F.Supp. 2d at 115, 1-54 (citing multiple congressional enactments).

Danielle Conway-Jones, *The Perpetuation of Privilege and Anti-Affirmative Action Sentiment in Rice v. Cayetano*, 3 Asian-Pac. L. & Pol'y J. 7 (2002). The interests advanced by civil rights/affirmative action programs (equality, integration, diversity) are different from the **restorative** interests advanced by the Princess in establishing Kamehameha Schools—namely, ensuring the survival of an indigenous people in their own land, preserving Native Hawaiian assets for their benefit, and promoting self-determination.

Application of *McDonnell-Douglas* and *Weber/Johnson* in this case undermines the Hawai'i community's confidence in civil rights laws, distorting them from hard-won instruments to remedy employment discrimination to legal strategies used to undermine the legitimate aspirations of native peoples for self-determination. This result can be avoided, however, if this Court recognizes the history surrounding establishment of Kamehameha Schools and the purposes its admissions policy attempts to address, as a different, additional type of legitimate, non-discriminatory reason.

The only fair way to reconcile the two stories in Section III.A. is to recognize what both are about: justice and fairness; protecting those who have been denied their rights, whether human or civil; and remedying wrongs. From this common thread, the Court can weave a new tale, without undermining civil rights or the rights of Native Hawaiians to self-determination.

IV. CONCLUSION

For the foregoing reasons, HCRC urges this Court to grant Appellees' petition for en banc rehearing.

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